IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
December 19, 2006 Session

STATE OF TENNESSEE v. DONALD LUKE SEIBER

Appeal from the Criminal Court for Knox County
No. 73049 Ray L. Jenkins, Judge

No. E2006-00816-CCA-R3-CD - Filed June 7, 2007

The defendant, Donald Luke Seiber, was convicted by a Knox County Criminal Court jury of aggravated kidnapping, aggravated assault, and two counts of sexual battery. The defendant appealed. The Court of Criminal Appeals affirmed his convictions but remanded for a new sentencing hearing because adequate findings were not made to support an effective sentence of 16 years. Upon remand, the trial court again imposed sentences of two years each for sexual battery in counts one and two, ten years for aggravated kidnapping in court three, and four years for aggravated assault in court four, for an effective 16-year sentence based on the existence of multiple enhancement factors and because the defendant was a "dangerous offender." The defendant again appealed. Our de novo review reveals that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), was decided prior to the defendant's first sentencing hearing, and the defendant then began his Sixth Amendment challenge to Tennessee's sentencing scheme and the trial court's authority to enhance his sentence beyond that authorized by the jury's verdicts. Because *Blakely* and its progeny are controlling, we reverse the trial court's sentencing determinations and modify the defendant's sentences for an effective sentence of 15 years, with specific findings that the defendant is a "dangerous offender" who merits consecutive sentencing.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed as Modified.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and DAVID H. WELLES, J., joined.

Michael T. Cabage, Knoxville, Tennessee, for the Appellant, Donald Luke Seiber.

Robert E. Cooper, Jr., Attorney General & Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Philip H. Morton, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

A lengthy recitation of the facts underlying the defendant's aggravated kidnapping, aggravated assault, and sexual battery convictions appears in this court's prior opinion, affirming the convictions but remanding the case for resentencing, *see State v. Donald Luke Seiber*, No. E2004-01794-CCA-R3-CD (Tenn. Crim. App., Knoxville, Oct. 25, 2005), *perm. app. denied* (Tenn. 2006). The following is taken from this court's evidence sufficiency analysis:

> Tennessee Code Annotated section 39-13-304(a)(5) (1997) defines aggravated kidnapping as "false imprisonment, as defined in § 39-13-302, committed . . . [w]hile the defendant is in possession of a deadly weapon or threatens the use of a deadly weapon." False imprisonment is defined as the knowing removal or confinement of another unlawfully so as to interfere substantially with the other's liberty. Tenn. Code Ann. § 39-13-302(a) (1997). The victim testified that the [defendant], not her drug dealer, held her at gunpoint and knifepoint in his home for a period of several hours. She stated that she believed the [defendant] would use the weapons on her if she attempted to leave. She further stated that the doors were locked, and she never felt that she could escape from the [defendant]. The victim testified that the [defendant] held the knife against her neck and cut her with it and that she was very frightened for her life. Seiber, the [defendant's] son, testified that the [defendant] came into the kitchen where he and the victim were talking. The [defendant] was carrying the gun in one hand with his finger on the trigger. The [defendant] put his other hand on the victim "up against the door." The gun then discharged, and the bullet lodged in the door frame over the victim's head. Accordingly, we conclude that the evidence is sufficient to support the [defendant's] conviction for aggravated kidnapping.
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> In order to obtain the [defendant's] conviction for aggravated assault, the State needed to prove that the [defendant] intentionally or knowingly assaulted the victim while using or displaying a deadly weapon. *See* Tenn. Code Ann. § 39-13-102(a)(1)(B) (1997). An assault is committed when the [defendant] "[i]ntentionally or knowingly cause[s] another to reasonably fear imminent bodily injury." Tenn. Code Ann. § 39-13-101(a)(2) (2003). The victim testified that the [defendant] hit her with his fists and the gun, threw her on the floor, kicked her, dragged her by her hair, stomped on her back, slashed her face and neck with a steak knife, put the knife in her mouth with the tip pointed toward the back of her throat, and, while wearing work boots, repeatedly kicked her genital region. Nurse McDonald testified that the victim's injuries included multiple

> abrasions and bruising around her face and ears, a diamond patterned injury on her right shoulder, bruising on the insides of her thighs, lacerations to the labia minora, and swelling and discoloration to the labia majora. Dr. Myers testified that the victim had multiple bruises and scratches, as well as a large vulvar hematoma. As a result of her injuries, the victim was hospitalized for five days. We conclude that the evidence overwhelmingly supports the [defendant's] conviction for aggravated assault.
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> The [defendant] was also convicted of two counts of sexual battery. Tennessee Code Annotated section 39-13-505(a)(1)-(2) (1997) defines sexual battery as follows:
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> (a) Sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:
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> (1) Force or coercion is used to accomplish the act; [or]
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> (2) The sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the contact that the victim did not consent. . . .
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> In the instant case, the victim testified that the [defendant] inserted a steak knife into her genital opening and twisted it. He then alternated between inserting the knife inside her and kicking her genitals while telling her that he was going to kill her and her family. While the [defendant] asserts that the proof at trial indicated that the victim's drug dealer was responsible for her injuries, the jury, as was its prerogative, heard the proof and determined that the [defendant] was guilty of two counts of sexual battery. We conclude that the evidence amply supports the jury's determination.

Id., slip op. at 7-8.

The issue that brings this case before us a second time is sentencing. The jury convicted the defendant of Class B, C, and E felonies. At the time of the defendant's original sentencing, the presumptive sentence for Class B, C, and E felonies was the minimum sentence within the appropriate range. *See* T.C.A. § 40-35-210(c) (2003). The defendant qualified as a Range I offender; therefore, his presumptive sentence was eight years for the Class B aggravated kidnapping conviction, three years for the Class C aggravated assault conviction, and one year for the Class E sexual battery convictions. *See id*. § 40-35-112(a)(2), (3), & (5).

The defendant's original sentencing hearing was conducted on July 8, 2004. Fourteen days earlier, the United States Supreme Court had released its opinion in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), holding that the "statutory maximum" to which a trial court may sentence a defendant is not the maximum sentence after application of appropriate enhancement factors, other than the fact of a prior conviction, but the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id*. at 303, 124 S. Ct. at 2537. Under *Blakely*, then, the "statutory maximum" sentence which may be imposed is the presumptive sentence applicable to his or her offense. *See id*., 124 S. Ct. at 2537. The presumptive sentence may be exceeded without the participation of a jury only when the defendant has a prior conviction and/or when an otherwise applicable enhancement factor was reflected in the jury's verdict or was admitted by the defendant.

At the July 8 sentencing hearing, the parties briefly discussed *Blakely*'s impact on Tennessee's sentencing scheme, but the trial court did not comply with *Blakely* in sentencing the defendant. In arriving at an effective sentence of 16 years, the trial court applied six enhancement factors: (2) the defendant has a previous history of criminal convictions or criminal behavior; (6) the defendant treated the victim with exceptional cruelty during the commission of the offense; (7) the personal injuries inflicted upon the victim were particularly great; (10) the defendant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense; (11) the defendant had no hesitation about committing a crime when the risk to human life was high; and (17) the crime was committed under circumstances under which the potential for bodily injury to the victim was great. *See* T.C.A. § 40-35-114(2), (6), (7), (10), (11), & (17) (2003).[1] The trial court also ordered that the defendant's sentences for aggravated kidnapping and aggravated assault be served consecutively.

The defendant appealed his convictions and sentence. In his brief to the court, the defendant again raised and argued that *Blakely* applied to Tennessee's sentencing scheme and that his sentence violated the directives of *Blakely*. This court did not reach the *Blakely* issue because the trial court failed to make adequate sentencing findings necessary for appellate review. *Donald Luke Seiber*, slip op at 13-15. This court, accordingly, remanded the case for the trial court to make the necessary findings. *Id*., slip op. at 15.

From the record before us, we discern that upon remand the defendant filed a written motion for a sentencing hearing or, alternatively, for reconsideration of the previous sentence. In his motion, the defendant again raised and relied upon the Supreme Court's decision in *Blakely*. The

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[1] Tennessee Code Annotated section 40-35-114, as amended in 2002 by Public Act 849, § 2(c), effective July 4, 2002, added one enhancement factor and subsequently renumbered all of the original enhancement factors in the statute. Thus, for the time period during which the defendant's offenses were committed, the enhancement factor pertaining to criminal history was subsection (2); the enhancement factor for exceptional cruelty was subsection (6); the enhancement factor for infliction of particularly great personal injuries was subsection (7); the enhancement factor for possession of a deadly weapon was subsection (10); the enhancement factor for no hesitation in committing a crime when the risk to human life was great was subsection (11); and the enhancement factor for great potential for bodily injury to the victim was subsection (17).

State, for its part, filed proposed findings of fact in support of enhancement factors but did not mention or address the impact of *Blakely* upon resentencing. On March 27, 2006, the trial court entered a written order resentencing the defendant to a term of 16 years, again with consecutive service of the aggravated kidnapping and aggravated assault convictions. The trial court's order did not mention *Blakely*, and we note that by the time of the order, the Tennessee Supreme Court had released its opinion in *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), holding that Tennessee's Criminal Sentencing Reform Act of 1989 did not violate the Sixth Amendment right to jury trial and did not run afoul of *Blakely*. *Id*. at 654-61.

The defendant timely appealed the resentencing order. Thus the matter is again before us, and the defendant again raises the impact of *Blakely* on Tennessee's Criminal Sentencing Reform Act of 1989 and insists that his sentence is excessive and violates his Sixth Amendment rights. The State in its brief relies on *Gomez* as dispositive of the issue.

We begin by noting that *Blakely* was decided 14 days prior to the defendant's original sentencing. The defendant registered a *Blakely* complaint at each appropriate juncture in his case, and we hold that he has preserved the issue.

Two important developments inform our *Blakely* analysis in this case. On January 22, 2007, the United States Supreme Court released its decision in *Cunningham v. California*, ___ U.S. ___, 127 S. Ct. 856 (2007), holding that California's sentencing scheme did not survive Sixth Amendment scrutiny intact under *Blakely*, and following on the heels of *Cunningham*, the Supreme Court on February 20, 2007, vacated the Tennessee Supreme Court's judgment in *Gomez* and remanded that case for reconsideration in light of *Cunningham*, *see Gomez v. Tennessee*, ___ U.S. ___, 127 S. Ct. 1209, 75 U.S.L.W. 3429 (2007). This court has previously analyzed at length the meaning and impact of *Cunningham* and the Supreme Court's vacating the judgment in *Gomez, see State v. Mark A. Schiefelbein*, No. M2005-00166-CCA-R3-CD, slip op. at 55-60 (Tenn. Crim. App., Nashville, Feb. 8, 2007), *reh'g granted (*Mar. 7, 2007) (order on petition to rehear modifying defendant's sentences pursuant to *Blakely* and *Cunningham), perm. app. filed* (Apr. 19, 2007), and we do not repeat that analysis. Suffice it to say that *Gomez* no longer controls pre-2005 sentencing. *Id*. (order on petition to rehear; "*Cunningham* did apply the *coup de grace* to the rationale employed in Tennessee's pre-2005 sentencing law.").

Thus, the *Blakey-Cunningham* regime controls the present case, and that regime instructs us, "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakey*, 542 U.S. at 301, 124 S. Ct. at 2536 (quoting *Appendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)). The defendant in the present case has a prior criminal record, which we will address. Also, based upon the terms of count three of the indictment, the jury's verdict of guilty of aggravated kidnapping necessarily entails a jury finding that the defendant used a deadly weapon in committing that offense. Although enhancement factor (10), the deadly weapon factor, may not be applied to enhance the aggravated kidnapping sentence in count three because the use of a deadly weapon is an essential element of that offense as alleged,

see T.C.A. § 40-35-114 (2003), it may be used to enhance the sentences for sexual battery. Thus, but for a prior criminal record and the use of a deadly weapon in counts one and two, *Blakey-Cummingham* principles mandate sentences of eight years for the aggravated kidnapping conviction, three years for the aggravated assault conviction, and one year for each sexual battery conviction. *See* T.C.A. § 40-35-112(a)(2), (3) & (5) (2003).

Because there is no Sixth Amendment sentencing prohibition against taking into account a prior conviction, we now evaluate the defendant's criminal history as a traditional enhancement factor.

When a defendant challenges the length, range or manner of service of a sentence, it is the duty of this court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2003). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. *Id*. § 40-35-401, Sentencing Comm'n Cmts. Thus, if the trial court followed the statutory sentencing procedure, made findings of facts that are adequately supported in the record and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court that are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

We have reviewed the trial court's resentencing order in light of our instructions upon remand "for the trial court to make findings necessary for this court to determine whether consecutive sentencing was appropriate" and "for the trial court to identify, inter alia, the facts supporting each enhancement factor found to be applicable." *Donald Luke Seiber*, slip op. at 15. The resentencing order, we conclude, does not reflect that the trial court adequately considered the sentencing principles, and it is not entitled to a presumption of correctness. Therefore, we will review the defendant's sentence de novo without a presumption of correctness. *See* T.C.A. § 40-35-401(d) (2003); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review of a sentence, we must consider: (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or enhancement factors; (g) any statements made by the defendant on his or her own behalf; and (h) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2003); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging a sentence has the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401 (2003), Sentencing Comm'n Cmts.

We discern from the presentence investigation report that the defendant was convicted of public intoxication in 1985, driving under the influence in 1984, and reckless driving in 1984. Although the defendant's criminal record is not abysmal, the prior convictions are not inconsequential. They signal, inter alia, the defendant's inability to control his alcohol consumption that ultimately contributed to the vicious and unprovoked attack on the victim in this case. Accordingly, we hold that the convictions justify enhancing the defendant's aggravated kidnapping sentence from eight to nine years, the aggravated assault sentence from three to four years for the same reason, and the sexual battery sentences from one to two years. The use of a deadly weapon is also considered in enhancing the sexual battery convictions.

Turning next to possible mitigating factors, the defendant insists that he "is an elderly man with poor health and bad vision and that any type of minimal sentence would be a life sentence." We note that he has been declared partially disabled by the Veterans Administration. However, the presentence report quotes the defendant's assessment that his health is "fair," not poor, and it listed a "muscle relaxer" as the only medication he was taking. We do not believe the defendant's characterization of his health is supported by the record, and even if it were, we would decline to assign much weight to it.

The defendant also points out that he has no prior felony convictions. The absence of felony convictions does not equate to no prior criminal record. Even so, a court is not required to consider the absence of a prior criminal history as a mitigating factor. *See State v. Williams*, 920 S.W.2d 247, 261 (Tenn. Crim. App. 1995). We do not believe the absence of felony convictions merits recognition and/or weight as a mitigating sentencing factor in the defendant's case.

Although not raised by the parties, we have also considered sua sponte whether the defendant's Class B sentence should be mitigated pursuant to the aggravated kidnapping statute, *see* T.C.A. § 39-13-304 (2006). Subsection (b)(2) of that statute provides, "If the offender voluntarily releases the victim alive or voluntarily provides information leading to the victim's safe release, such actions shall be considered by the court as a mitigating factor at the time of sentencing." *Id*. § 39-13-304(b)(2). Application of this factor is, however, contraindicated by the facts, as evidenced by this court's previous opinion.

> Finally, the [defendant] stopped assaulting the victim. He took her to the living room where he made her sit naked on some broken glass on the floor while she held the knife in her mouth lengthwise. The [defendant] sat in a chair across from the victim, but within a couple of minutes, he passed out. The victim kept the knife, put on a long-sleeved shirt, [] ran out of the house[, and] . . . collapsed in Officer Cook's yard. She dropped the knife in the yard and told Officer Cook about her ordeal. Officer Cook called an ambulance for the victim.

Donald Luke Seiber, slip op. at 3. Thus, the victim's escape was facilitated by the defendant "passing out" and not from any voluntary action on his part.

In summary, (a) discarding as we must, pursuant to *Blakely-Cunningham*, all sentence enhancement factors other than the defendant's prior convictions, (b) assigning weight to the prior convictions as sentence enhancement factors, and (c) finding no mitigating sentencing factors, we modify the defendant's sentences as follows: for the aggravated kidnapping conviction, a sentence of nine years is imposed; for the aggravated assault conviction, a sentence of four years is imposed; and for each sexual battery conviction, a sentence of two years is imposed.

We are left with the question of consecutive sentencing. This court consistently held that *Blakely* did not impact consecutive sentencing. *See, e.g., State v. William Shane Bright*, No. E2006-01906-CCA-R3-CD, slip op. at 3 n.1 (Tenn. Crim. App., Knoxville, Apr. 30, 2007); *State v. Earice Roberts*, No. W2003-02668- CCA-R3-CD, slip op. at 14-15 (Tenn. Crim. App., Jackson, Nov. 23, 2004); *State v. Lawrence Warren Pierce*, No. M2003-01924-CCA-R3-CD, slip op at 16 (Tenn. Crim. App., Nashville, Nov. 9, 2004).

Under Tennessee Code Annotated section 40-35-115(b), a court may impose consecutive sentences when the defendant is convicted of more than one offense and when the trial court finds by a preponderance of the evidence that:

> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
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> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist . . .;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor . . .;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b)(1)-(7) (2006).

In this case, the facts overwhelmingly support consecutive sentencing based on the defendant's status as "a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." *Id*. § 40-35-115(b)(4). We recognize when that basis for consecutive alignment of sentences is invoked, the court is to make two additional findings. *See State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). First, the court must find that an extended sentence is necessary to protect the public from further criminal conduct by a defendant, and second, it must find consecutive sentencing to be reasonably related to the severity of the offenses. *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995).

Referring again to this court's previous opinion, factual support for application of the dangerous offender basis for consecutive sentencing is found in the following:

> The [defendant] produced a gun and locked all of the doors. He proceeded to hit the victim with his fists and the gun, threw her on the floor, kicked her, dragged her by her hair, and stomped on her back. The victim stated that the ordeal lasted all day and into the night.
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> The victim said that the [defendant] was drinking rum during the incident. At one point during the episode, the [defendant] put the gun to the victim's head and forced her to drink half of a big bottle of rum in a short amount of time. The victim asserted that she did not "regularly" drink alcoholic beverages.
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> . . . .
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> The victim testified that although she could not remember falling asleep, she woke sometime late the next morning. . . . When the victim came out of the bedroom, she noticed that the [defendant's] youngest son, Roger A. Seiber, was in the house. Seiber saw the victim and realized the [defendant] had hurt her. . . . The [defendant], still in possession of the gun, threatened to kill his son if he did not leave. Before Seiber left, the [defendant] pushed the victim up against a wall, placed the gun on top of her head, and fired a bullet into the wall right behind her head. The victim stated that the gunshot was loud and caused one of her eardrums to rupture, resulting in temporary hearing loss. Seiber begged the [defendant] to stop. The [defendant] told Seiber that if he left and called the police, he would kill the victim and any officer who came to help her.
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> . . . Shortly after Seiber left, the [defendant] came into the kitchen and began to lightly slash the victim's face and neck with a steak knife. The [defendant] then ordered the victim to go into the bathroom, undress, and shave her pubic area. The [defendant] made

> the victim shave twice because her first attempt did not satisfy him. After the victim completed her task, the [defendant] instructed the victim to sit on the commode while he cut her hair very short with a pair of kitchen scissors. . . .
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> Next, the [defendant] ordered the victim, who was still sitting on the commode, to place one leg on the sink and the other leg on the edge of the bathtub. The [defendant] put the steak knife in the victim's mouth with the tip pointed toward the back of her throat and made her hold it, warning her that if she dropped the knife he would shove it through her neck. The [defendant], who was wearing heavy work boots, savagely kicked the victim repeatedly between her legs. The victim testified that it was difficult for her to hold onto the knife during the kicking because the abuse was painful.
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> After the [defendant] stopped kicking the victim, he took the knife from her mouth and inserted the full length of the blade into her genital opening, twisting the knife back and forth. The insertion of the knife caused the victim additional pain and some bleeding. The [defendant] alternated between inserting the knife inside her and kicking her while telling her that he was going to kill her and her family. The victim stated that after a certain point, she ceased being able to feel the pain the [defendant] was inflicting.
>
> Finally, the [defendant] stopped assaulting the victim. He took her to the living room where he made her sit naked on some broken glass on the floor while she held the knife in her mouth lengthwise. The [defendant] sat in a chair across from the victim, but within a couple of minutes, he passed out.

Donald Luke Seiber, slip op. at 2-3.

The foregoing evidence presented at trial shows that the defendant brutalized, degraded, and dehumanized the victim. Over an extended period of time, the victim endured a mind-numbing ordeal to the point that she ceased being able to feel the pain the defendant was inflicting as he alternated between inserting the knife inside her and kicking her while telling her that he was going to kill her and her family. The defendant epitomizes "a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." The defendant even threatened to kill his own son, and heedless of the potential consequences to everyone from a bullet ricochet, he placed a gun on top of the victim's head and fired.

We conclude that consecutive sentencing is necessary to protect the public from future misconduct by this defendant. The defendant's unprovoked conduct toward the victim and his own son and his threats to kill any taxi driver or officer who arrived to help indicates that he will not hesitate to threaten or actually use violence against others. Furthermore, it appears that the defendant was prevented from further torturing and brutalizing the victim only because he "passed out." We also conclude that consecutive alignment of the sentences for aggravated kidnapping, aggravated assault, and one count of sexual battery, for an effective sentence of 15 years is without question commensurate with the gravity of his offenses.

Thus, we modify the judgments of conviction to impose an effective sentence of 15 years.

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JAMES CURWOOD WITT, JR., JUDGE